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COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

DAVID R. GRIFFITH,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

On Discretionary Review from the Tenth Court of Appeals, in cause no. 10-14-00245-CR; Direct Appeal in cause number C-35408-CR; County Court at Law, Navarro County, Texas, the Honorable Amanda Putman, presiding.

Appellant's Reply Brief

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

DAVID R. GRIFFITH,
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v.

THE STATE OF TEXAS,
APPELLEE.

To the Honorable Judges of the Court of Criminal Appeals:

David R. Griffith, Appellant, presents this Reply Brief.

3. ISSUES PRESENTED

First Issue: Appellant asks this Court to consider whether sections 26.045(a) and 25.1772(a)(1)(D) of the Government Code conferred subject matter jurisdiction on the Navarro County Court at Law to hear this felony case.

Second Issue: The evidence that the State directs this Court to fails to provide legally sufficient evidence that the second assault occurred before April 4, 2013. For that reason the evidence is legally insufficient to support the verdict, the verdict should be vacated and, if possible, reformed to reflect a lesser included offense.

4. SUMMARY OF THE ARGUMENT

In his first issue, Griffith urges this Court to consider whether the Navarro County Court at Law had subject matter jurisdiction to hear this felony case under sections 26.045(a) and 25.1772(a)(1)(D) of the Government Code. Because there was no assignment of the case to the County Court at Law, the trial court lacked subject matter jurisdiction. Appellant urged this issue in his opening brief and the State decided not to respond. If this Court considers the County Court at Law's subject matter jurisdiction, then this case can be resolved with a *per curium* opinion that remands this case to a court of competent jurisdiction.

In his second issue, Griffith contends that the evidence that the State relies on fails to show that the evidence was legally sufficient to support the jury's verdict. The State's argument relies on evidence that the State contends permitted the jury to "deduce" legally sufficient evidence. Although Chief Justice Gray, in dissent, and Appellant, in his opening brief, explained how this Court distinguishes "speculation" from an "inference," the State's argument disregards this Court's distinctions and relies on speculation. Specifically, the State disregarded this Court's warning that "even if a conclusion that has been reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond reasonable doubt." Here the conclusions that the State offers are not unreasonable, but they are based on speculation and are thus legally insufficient.

5. ARGUMENT

I. **APPELLANT'S FIRST ARGUMENT: The County Court at Law did not have subject matter jurisdiction to hear this felony case.**

"Subject matter jurisdiction is offense-specific because it is about what type of offense can be tried in the court." *Trejo v. State*, 280 S.W.3d 258, 264 (Tex. Crim. App. 2009) (Keller, P.J., concurring).

In his opening brief, Appellant urged this Court to consider whether the Navarro County Court at Law had subject matter jurisdiction to have heard this case. The State elected not to respond to Appellant's short argument. [State's Brief, 6 n.1].

Under sections 26.045(a) and 25.1772(a)(1)(D) of the Government Code, the trial court did not have subject matter jurisdiction to hear this case because the district court judge never assigned the case to the County Court at Law. Tex. Gov't Code §§ 26.045(a); 25.1772(a)(1)(D). Appellant asks this Court to consider this issue under Rule 67.1. Tex. R. App. P. 67.1.

II. **Appellant's Second Argument: The evidence is insufficient to have allowed a rational jury to infer that the second assault occurred before A.G.'s fourteenth birthday.**

A. Issue

The State concedes that there is no direct evidence to support the judgment, but contends that the evidence is legally sufficient for a jury to have "deduced" that the second assault occurred before A.G.'s fourteenth birthday.

The State's brief disregards the distinctions that this Court has made between a valid inference and speculation; the State's arguments, here, as in the intermediate-appellate court, rely on speculation. The State's arguments are not unreasonable and the version of events posited by the State could be correct, but the evidence is insufficient to infer that the State's version of events is correct, and, as Chief Justice Gray wrote, "[i]t matters."

B. The State's Argument and Appellant's Reply

The brevity of the State's brief is an acknowledgment that there is very little evidence to support the verdict. The only evidence that the State relies on comes from Bailey and D.G. The State relies on two blocks of testimony. The first block seeks to establish that Bailey and D.G. testified about the same assault and that it was the second assault. But this evidence fails to establish when the assault occurred or even that Bailey and D.G. testified to the same occurrence. The second block attempted—but failed—to establish when the second assault occurred.

The anatomy of the State's argument (relying on both blocks of testimony) is:

- Bailey testified to a legally sufficient assault that she described as the second assault, but Bailey did not know when the assault occurred;
- D.G. testified to an assault; and,
- D.G. testified that "something" occurred before she left Appellant in January 2013 and that the "something" must be the second assault.

[State's Brief, 3-5].

The State's argument fails because:

1. Bailey did not know when the second assault occurred;
2. The evidence does not establish or infer that Bailey and D.G. testified to the same occurrence but that even if Bailey and D.G. did testify to the same occurrence, D.G. did not provide evidence of when this incident occurred; and,
3. When D.G. did provide general testimony about when an assault occurred, her testimony did not establish which assault of the four she was testifying about.

C. The State's Argument Provides no Evidence of When the Second Assault Occurred

The State wisely never argued that Bailey testified when the second assault occurred. [State's Brief, 3-5]. Instead, the State argued that Bailey and D.G. testified to the same incident and that D.G.'s testimony allows for the deduction that the second incident occurred in January 2013.

i. No Evidence to Establish that D.G. and Bailey Testified to the Same Incident/Assault

The State's argument asks this Court to compare aspects of the first block of testimony, to consider Bailey's testimony and D.G.'s testimony, and to conclude that their testimony describes the same incident/assault. The State's argument asks this

Court to conclude that D.G.'s and Bailey's testimony referred to the same incident/assault based on these similarities:

1. A.G. was using or given Ambien;
2. That D.G.'s testimony that Appellant "put his hand on [A.G.'s] stomach" is necessarily the same (albeit "downplayed") incident as Bailey's testimony that "[t]he victim woke up and Petitioner was trying to take her shirt off. She told him to stop. He touched her breast. He also put his hand down her pants and digitally penetrated her." ; and,
3. D.G. did not take either allegation seriously.

[State's Brief, 4].

The State's argument fails because 1) it does not consider all of the evidence, as requires by *Adames*; and, 2) the testimony that the State relies on to establish when the assault occurred does not indicate whether the assault was the first, second, or third assault.

First, the State's argument fails to consider all of the evidence as required by *Adames*. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). Specifically, and importantly, the State's brief fails to acknowledge that the record contains considerable evidence that A.G. consumed Ambien (and other sleep aids)

routinely.[1] The fact that A.G. routinely took Ambien, even stole Ambien, means the fact that both D.G. and Bailey testified that in their version of events that A.G. was on Ambien is not a logical bridge that allows this Court to move from speculation to an inference. That A.G. routinely took Ambien renders this "similarity" in the testimony almost without significance.

The State also fails to acknowledge that D.G. did not believe A.G.'s claims and, for that reason, the fact that D.G. "laughed off" the assault that Bailey described and that D.G. "did not take the allegation [that D.G. testified to] seriously because the victim was hallucinating" provides no evidence that the events that D.G. and Bailey testified to were the same assault. *Id*.

Finally, the State's argument also fails because the evidence that the State relies on does not allow the inference that D.G. and Bailey testified to the same incident. While it is conceivable that the first block of testimony (testimony from D.G. and Bailey) concerns the same incident, and that D.G. deliberately "downplayed" the incident, no rational juror could have inferred that the testimony concerned the same occurrence. *Id*. The State contends that a rational juror could have deduced that the testimony described the same incident but the evidence that

[1] The State's argument does not include the evidence that "[B.O.] denies giving [A.G.] Ambien. But [A.G. has"—she, is [A.G.]—"has stolen them" [8 RR 67]; Q "He denies any given [A.G.] his Ambien, although, she does beg for it. He states that she had stole -- he states that she has stolen it before and that is why he keeps it in the car with him." Right? A. Yes." [9 RR 104]; and, [A.G.] has seen things. If she takes Ambien, she will see things. [10 RR 38];

the State relies on for this deduction—that A.G. was on Ambien, the "similarity" of the events, and that D.G. did not take the outcry seriously—is "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). Therefore the State's argument is based on speculation and is not legally sufficient evidence.

For these reasons, the State's argument that the first block of testimony (the testimony of D.G. and Bailey concerning an incident/assault) establishes that the two witnesses testified to the same occurrence is only speculation. Without this linkage the State's argument fails. But, if this Court believes that a rational juror could infer that the two incidents were the same, then this Court must consider whether the State's remaining evidence allowed a rational jury to conclude that the assaults occurred on or before A.G.'s fourteenth birthday in April 2013.

ii. No Evidence to Establish when the Assaults Occurred

To establish when the second assault occurred, the State turns to a second block of testimony, this time testimony from D.G.

According to the State's argument, D.G. testified that she left Appellant in January 2013 after A.G. reported the second assault to her. But the testimony that the State relied on does not allow this conclusion because it does not allow for any rational inference that the incident that A.G. described was the second incident. Instead, the assault D.G. testified to could have been the first assault, the second, or

even the third (but not the fourth). While the State's argument is not unreasonable, it necessitates an unsupported assumption that renders the premise mere speculation instead of an inference.

The evidence that the State relies on for when the second assault occurred is:

A. Yes. I talked to Amy first when we got to the Sheriff's Department [December 2013].

Q. Okay. When you talked with her --

A. Yes.

Q. -- did she explain?

A. Yes.

Q. Okay. Did she talk to you by yourself or with David?

A. By myself.

Q. When she first told y'all about the fact that [A.G.] made an outcry of sexual abuse, did she tell y'all separately or together?

A. Separately.

Q. And then did you have a conversation with -- with Amy Taylor?

A. Well, she would ask questions so I don't call it a conversation. I just --

Q. Okay. When you talked with her, did you ever tell her that [A.G.] had said your husband had done *something* to her before?

A. I believe I did.

Q. Do you recall when it was [A.G.] told you *something* before?

A. I recall.

Q. When was it. [*sic*.]

A. It's been a few years back. I don't exactly remember the dates, but.

Q. If you told Amy Taylor it was around January of 2000 -- well, let me ask you this first. **After she told you this, did you leave David for a little while?**

A. **Not for that.**

Q. **Oh, it was for something else?**

A. **Yes.**

Q. **Okay. But you left him in when -- January of 2012?**

A. **No.**

Q. **No. When was it that you did leave him for a little while?**

A. **That would have been January of -- well, maybe it was January of 2012. Yes, it was.**[2]

[10 RR 34-35]. (underlining and italics added for emphasis, bold used for what the State relied on in its argument).

This testimony provides no evidence of what the "something" was beyond an outcry of sexual assault. Assuming that the "something" was an outcry, the

[2] D.G. promptly corrected herself and testified that she meant to say May of 2013 instead of January 2012 and then she testified that she meant January 2013 instead of January or May of 2012. [10 RR 36; 73].

"something" could have been any one of the first three assaults. There is no evidence that permitted the jury to infer that this "something" was the second or third assault instead of the first. Therefore, this portion of the State's argument is "reasonable speculation" but it is insufficient to provide the required evidence.

iii. Conclusion

To subscribe to the State's argument, this Court must accept the speculative contention that Bailey and D.G. testified to the same offense and then conclude that this incident occurred before April 4, 2013. If the Court accepts that position, then the Court must accept the speculative contention that D.G.'s answer, "I believe I did" to the question from the attorney for the State, "When you talked with her, did you ever tell her that [A.G.] had said your husband had done *something* to her before" establishes that the "something" was the second or third assault instead of the first. There is no rational basis for this conclusion.

For these reasons, the evidence that the State relies on does not establish that the second assault occurred on or before April 4, 2013 and for that reason the evidence is legally insufficient to support the verdict.

C. Conclusion

The evidence that the State relies on does not establish when the second assault occurred and therefore does not support the verdict.

6. Conclusion and Prayer

Appellant asks this Court to find that the trial court lacked subject matter jurisdiction to hear this case and to vacate the judgment and to remand for a new trial in a court of competent jurisdiction.

Alternatively, this case falls squarely within the admonitions issued by the Court of Criminal Appeals in *Hooper*. Here the evidence allows for reasonable speculation but the evidence does not support the inference that the second assault occurred on or before April 4, 2013. Thus the evidence does not support the verdict. Appellant asks this Court to vacate the existing judgment and to render a judgment of acquittal or, in the alternative, to reform the judgment to reflect the lesser included offense of sexual assault and to remand this case for a new punishment hearing.

Respectfully Submitted,

/s/ Niles Illich

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CERTIFICATE OF COMPLIANCE

This is to certify that this Reply Brief complies with Rule 9.4(i)(2) of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 7,500 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this reply contains 2923 words. This Brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF SERVICE

This is to certify that on November 5, 2018 that a true and correct copy of this Brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

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